No. 17506

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD ERNEST KOCH,

Appellant,

vs.

RUDOLPH ZUIEBACK,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

JURISDICTION.

Appellant, plaintiff below, filed an action against Rudolph Zuieback, Chairman of Local Board 103, Selective Service System, Los Angeles, California, and other persons connected with the Selective Service System, praying for a declaratory judgment that the Local Board had acted illegally in its classification of appellant and that appellant was entitled to a classification of V-A and further praying for damages against the defendants, with punitive damages, for injury alleged to have been done the appellant in the course of his processing by the Selective Service System. [R. 2.]* A Motion to Dismiss appellant's Complaint For Damages and Declaratory Judgment was filed on behalf of

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*R. refers to the Transcript of Record. B. indicates references to appellant's Opening Brief.

appellee, Rudolph Zuieback, the only defendant actually served in this action. [R. 17.] A Supplement to the Motion to Dismiss of the appellee was also filed in the District Court. [R. 49.] In an Opinion which now appears at 194 F. Supp. 651, *Koch v. Zuieback* (S. D. Cal. 1961), and which appears in the Transcript of Record at pages 55 to 70, judgment in the District Court was rendered in favor of appellee Rudolph Zuieback, treating the Motion to Dismiss appellant's Complaint for Declaratory Judgment as a motion for summary judgment pursuant to Rule 12(d) Federal Rules of Civil Procedure, and granting a summary judgment to the appellee and also granting appellee's Motion to Dismiss appellant's Complaint for Damages. [R. 70.] At the same time, on the Court's own Motion, a summary judgment for all defendants named, including those not served, was rendeerd in plaintiff's Complaint for a Declaratory Judgment and plaintiff's Complaint for Damages was dismissed as to all named defendants who had not been served. [R. 70.] Appellant filed a Notice of Appeal from the order of the District Court granting defendant's Motion to Dismiss appellant's Complaint for Damages against Rudolph Zuieback, and also from the order, on the Court's own Motion, dismissing plaintiff's Complaint for Damages as to all named defendants who had not been served. [R. 71.] Appellant did not appeal from the granting of the summary judgment in relation to plaintiff's Complaint for a Declaratory Judgment. The judgment of the District Court being a final decision, jurisdiction is conferred upon this Court by 28 U. S. C. §1291.

STATEMENT OF THE CASE.

The facts which were assumed to be true by the District Court for the purpose of rendering a decision on appellee's Motion to Dismiss appear in appellant's Complaint and, in summary, in the Opinion of the District Court. [R. 2, 55-59; 194 F. Supp. at pp. 653-54.]

It is related in appellant's original Complaint that he registered as required by law on October 21, 1948. [R. 4.] Approximately two years later he was assigned to Local Board No. 103. [R. 4.] On July 11, 1950, appellant was classified in Class I-A by Local Board 103. [R. 5.]

It is stated in appellant's original Complaint that after his classification on July 11, 1950, appellant's efforts to obtain information of the procedures for appeal were to no avail, that the defendants failed to post the names and addresses of Advisors to Registrants and/or Appeal Agents on their office bulletin board and that the Local Board did not have an official known as an Advisor to Registrants or one known as an Appeal Agent. [R. 5.]

Appellant attempted to obtain a reclassification as a conscientious objector, but he was informed that his requests were not timely and they were refused. As a result of his subsequent refusal to be inducted into the Armed Forces, appellant was convicted for his act of refusal and sentenced to a four-year term of imprisonment to be served in the United States Penitentiary, McNeil Island, Washington. [R. 5.]

On February 16, 1961, the warden of the United States Penitentiary, McNeil Island, notified appellant's Local Board that he had been received at said prison,

in order to inform the Board of his whereabouts. [R. 5.] Appellant's Complaint also contains the statement that on March 26, 1951, the Local Board mailed the appellant a notice that he had been reclassified in Class IV-F, directing the notice to his address prior to imprisonment. [R. 6.]

The Local Board inquired of the prison authorities as to appellant's status on February 15, 1955, and was informed that appellant had been released on parole on February 10, 1953 and was referred to the Chief U. S. Probation Officer in Los Angeles. [R. 6.] One day after his official release from parole supervision, the Local Board mailed a I-A classification to appellant's obsolete address; this classification was returned to the Board by the Post Office. [R. 6.]

Appellant has further alleged that the Board did not attempt to locate the plaintiff until after the ten-day appeal period had expired, at which time the Board sent plaintiff a change of address form to be returned by March 31, 1955. [R. 7.] Upon receiving the change of address form, appellant, on March 28, 1955, appeared at the Board office to ascertain why the Board still claimed jurisdiction over him although he had reached the age of 26 in 1952. At that time appellant was handed a duplicate copy of the I-A classification isseud on March 9, 1955. [R. 7.]

On April 1, 1955, appellant made written protest of his previous classifications and maintained that he was entitled to either an over-age classification (V-A) or, failing that, the conscientious objector classification (I-O). Appellant further requested a hearing before the Local Board. [R. 7.]

It is alleged in the Complaint that on June 7, 1955 plaintiff had a hearing before the Local Board at which he was expressly refused assistance of an attorney and was denied the use of two witnesses he had brought with him. [R. 7-8.] Appellant alleged that he was denied the right to discuss his file and his evidence. [R. 8.] Appellant made a summary of this hearing and filed it with the Board, and the Board also filed a summary transcript. Appellant also submitted other written evidence. Appellant was classified in Class I-O on July 12, 1955. [R. 7-8.]

The remaining allegations of appellant's original Complaint on pages 8-10 of the Transcript of Record are concerned with appellant's appeal from his Class I-O classification; a two-year period until October 22, 1957 at which time appellant's classification was reopened; appellant's reclassification as I-O on December 10, 1957; the Appeal Board's decision to retain plaintiff in Class I-O on March 23, 1958; appellant's classification in Class III-A; and appellant's reclassification in Class I-O on September 15, 1959, and, appellant's final classification in Class I-O by the Local Board, which classification the Appeal Board "again did not disturb". [R. 8-10.] Throughout appellant's complaint appear allegations that appellee's actions, and those of the other named defendants, were maliciously motivated. The course of appellant's various classifications and his protests relating thereto are summed up in the Opinion of the District Court on page 654, 194 F. Supp. and on pages 58 and 59 of the Transcript of Record.

On November 17, 1960, appellant filed a Complaint entitled Civil Action: For Damages and Declaratory Judgment seeking a declaratory judgment that the Local

Board had acted illegally in classifying appellant and declaring that appellant is entitled to a classification of V-A, and praying for both damages and punitive damages. [R. 2.] Appellee Rudolph Zuieback, the only defendant served, filed a Motion to Dismiss on January 24, 1961. [R. 17.] Appellee's Motion was treated as a motion for summary judgment in relation to plaintiff's Complaint for Declaratory Relief, and a summary judgment was granted appellee and all defendants named on the ground that the issue as to appellant's appropriate classification was moot. [R. 60, 70.] Appellee's Motion to Dismiss the Complaint for Damages was also granted. [R. 70.] On the Court's own motion, plaintiff's Complaint for Damages was dismissed as to all the named defendants not yet served. [R. 70.]

ISSUES PRESENTED.

1. Does appellant's Complaint present a federal question, thereby granting the District Court jurisdiction of the subject matter of the action for damages?

2. Assuming, *arguendo,* the existence of a federal question, are appellee Rudolph Zuieback and the other named defendants immune from a suit for damages because the acts alleged to have been performed by them were within the scope of their authority as Federal officials?

STATUTES AND REGULATIONS INVOLVED.

United States Code Annotated, Constitutional Amendment V, insofar as is pertinent to this proceeding, provides as follows:

> "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

42 U. S. C. A. §1985(3), in relevant part, provides as follows:

> "If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

28 U. S. C. §1331(a) provides as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

ARGUMENT.

I.

This Is No Federal Question Presented by Appellant's Complaint and, as a Result, the District Court Was Without Jurisdiction of the Subject Matter of the Action for Damages.

A. The Due Process Clause of the Fifth Amendment Does Not Authorize a Civil Action for Damages Against a Federal Official.

It would appear from appellant's Opening Brief that he has abandoned any attempt to rest the subject matter jurisdiction of this proceeding on the First, Ninth, Tenth, Thirteenth or Fourteenth Amendments to the United States Constitution. Those amendments were alleged as bases for jurisdiction in appellant's Complaint. [R. 2-3.] The issue whether subject matter jurisdiction of this action could be based on the First, Ninth, Tenth, Thirteenth or Fourteenth Amendments was decided in the negative, as set forth in the Opinion of the District Court. [R. 61-62; 194 F. Supp. pp. 655-656.]

The sole remaining constitutional amendment upon which appellant appears to rely is the Fifth Amendment, more precisely the due process clause of the Fifth Amendment. It is clear that in a case such as the present where recovery is sought for alleged violations of amendments to the United States Constitution, the trial court, before deciding the ultimate question of jurisdiction, at least has jurisdiction to examine the Complaint to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. *Bell v. Hood,* 327 U. S. 678, 681-685, 90 L. Ed. 939, 66 S. Ct. 773 (1946), *Ibid.* 71 F. Supp. 813

(S. D. Cal. 1947); *Agnew v. City of Compton,* 239 F. 2d 226, 229 (9th Cir. 1956); *Hoffman v. Halden,* 268 F. 2d 280, 288-289 (9th Cir. 1959). The District Court in the present case correctly assumed the limited jurisdiction necessary to determine the existence of a federal question. [R. 61; 194 F. Supp. at p. 655.]

In reaching the inevitable conclusion that the due process clause of the Fifth Amendment does not authorize a civil action for damages against a Federal official, the District Court relied on *Bell v. Hood,* 71 F. Supp. 813 (S. D. Cal. 1947) and *Johnston v. Earle,* 245 F. 2d 793, 796 (9th Cir. 1957). Bell v. Hood was an action for damages against special agents of the Federal Bureau of Investigation for damages resulting from alleged violations of the Fourth and Fifth Amendments. The matter was remanded to the District Court by the United States Supreme Court for the purpose of the District Court determining whether or not the Complaint was drawn so as to claim a right to recover under the Constitution and laws of the United States. *Bell v. Hood,* 327 U. S. 678 (1946). In deciding in the negative the issue of whether a federal question had been presented, it was held that the Fourth and Fifth Amendments limit only federal action and not action by the states or by individuals. Insofar as the special agents had exceeded their authority and acted outside of the scope of their authority as federal officers, they had acted not as federal officers but as individuals and would be unable to avail themselves of the doctrine of sovereign immunity. But in the *Bell* case, as in the present case, "inasmuch as the prohibitions of the Fourth and Fifth Amendments do not apply to individual conduct, the amendments themselves, when

violated, cannot be the basis of any cause of action against individuals." 71 F. Supp, at p. 817.

The decision of the District Court in *Bell v. Hood* was cited with approval by the Court of Appeals for the Ninth Circuit in the course of deciding a case involving the seizure of property by federal officers, finding that the Fourth and Fifth Amendments did not grant the court jurisdiction of the subject matter. *Johnston v. Earle,* 245 F. 2d 793, 796 (9th Cir. 1957). In the *Johnston* case the court was called upon to determine whether the tortious taking of property by federal officials acting beyond the scope of their authority, undoubtedly a tort cognizable in a state court, also creates a cause of action cognizable in the United States District Court because it is alleged that the action violated the Fifth Amendment.

The primary question in the present appeal is the issue of the existence of a federal question. In the event that no federal question is presented, there is no necessity of deciding the question of scope of authority and the subsequent immunity of the appellee. [R. 69; 194 F. Supp. at p. 659.] If no federal question is presented which brings the case into the purview of the jursidiction granted by 28 U. S. C. §1331(a), the only other possible basis for the jurisdiction of the District Court would be diversity of citizenship, as granted in 28 U. S. C. §1332. Appellant's original Complaint did not allege that the District Court obtained jurisdiction because diversity of citizenship exists between appel-

lant and appellee. As a matter of fact, appellant stated specifically that he is a resident of the Southern District of California. [R. 3, Paragraph I(5) of the First Cause of Action.] It is also clear from the Complaint that the various named defendants, served or otherwise, are also residents of California. The Complaint on its face therefore clearly indicated that diversity of citizenship does not exist. In the event, therefore, that there is no federal question basis for the District Court's jurisdiction, the federal District Court was not the proper forum for appellant to sue the appellee and the other named defendants for damages, even assuming a decision favorable to appellant on the question of immunity of the appellee and the other named defendants as federal officers.

B. No Federal Question Is Presented Under 42 U.S.C.A. §1985(3) by a Civil Action for Damages Against a Federal Official.

Appellant continues to rely on 42 U. S. C. A. §1985(3) as a basis for federal question jurisdiction in the present case. (B. 14-15.) The applicability of this section to the present case was extensively and thoroughly considered, and finally rejected, in the Opinion of the District Court. [R. 63-69, 194 F. Supp. 656-659.] The Opinion of the District Court contains an extensive discussion of the history and rationale behind what is clearly the present rule. The overwhelming weight of authority is that in order for Section 1985(3) to serve as a basis for a cause of action

for damages, at least some of the persons conspiring must be acting under color of state law.

Hoffman v. Halden, 268 F. 2d 280, 291 (9th Cir. 1959), and cases collected at p. 291, note 8;

Byrd v. Sexton, 277 F. 2d 418, 423-424 (8th Cir. 1960);

Brewer v. Hoxie School District, 238 F. 2d 91, 104 (8th Cir. 1956);

Williams v. Yellow Cab Co. of Pittsburgh, Pa., 200 F. 2d 302, 307 (3rd Cir. 1952) cert. den. *Dargan v. Yellow Cab. Co. of Pittsburgh, Pa.,* 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361;

Moffett v. Commerce Trust Co., 187 F. 2d 242, 247 (8th Cir. 1951), cert. den. 342 U. S. 818 (1951);

Gregoire v. Biddle, 177 F. 2d 579, 581-582 (2d Cir. 1949);

Oppenheimer v. Stillwell, 132 F. Supp. 761, 763, (S. D. Cal. 1955);

Hardyman v. Collins, 80 F. Supp. 501, 506-507, (S. D. Cal. 1948), see, also, *Collins, v. Hardyman,* 341 U. S. 651, 655, 659, 661, 71 S. Ct. 937, 95 L. Ed. 1254 (1951).

Appellant concedes that "color of federal action rather than state action is involved, . . ." (B. 14.) It is clear from the Complaint itself that all of the acts alleged to have been performed by the appellee and by the other named defendants were acts committed either as federal officials, under color of federal

law, or as individuals. None of the acts alleged could possibly be deemed state action or be deemed to have been performed under color of any state authority. As a result 42 U. S. C. A. §1985(3) can not be utilized by appellant to provide federal question jurisdiction for his suit.

In addition to the limitation that the acts performed must be performed under color of state law, 42 U. S. C. A. §1985(3) has been limited additionally in that a right of action for damages pursuant to the statute may be maintained only if the rights allegedly infringed fall within the category of rights "inherent in federal citizenship".

Snowden v. Hughes, 321 U. S. 1, 6-7, 64 S. Ct. 397, 88 L. Ed. 497 (1944);

Byrd v. Sexton, supra, 277 F. 2d 418, 424 (8th Cir. 1960);

Miles v. Armstrong, supra, 207 F. 2d 284, 286 (7th Cir. 1953);

Hardyman v. Collins, supra, 80 F. Supp. 501, 504 *et seq.* (S. D. Cal. 1948).

The rights which have been held to be inherent in federal citizenship, as opposed to rights "inherent in state citizenship" or "personal rights," include the right to assemble and petition Congress for a redress of grievances, the right to discuss national legislation and national affairs, the right to vote in national elections, the right to personal protection when in federal custody, the right to practice law before federal courts and the right to move from state to state.

Hardyman v. Collins, supra, 80 F. Supp. 501, 505, and cases cited.

In the instant case, the District Court declined "to categorize these rights one way or the other, except to indicate the view that they are not clearly precluded from the category of rights inherent in national citizenship", in referring to the alleged rights which the appellee and the other named defendants have purportedly infringed. [R. 69; 194 F. Supp. at p. 659.] Appellant has alleged that his right to a fair hearing and due process of law before a federal administrative agency has been abridged and he further alleges that appellee's acts have jeopardized his personal liberty and his right to conduct his business without harrassment. Appellee here urges again the ruling of the District Court that in view of the correctness of the holding by the District Court concerning the necessity and the absence of any acts performed under color of state authority, there is no necessity, in deciding the present case, to categorize in any manner appellant's rights which have been allegedly infringed assuming, *arguendo,* that he has correctly described existing "rights".

C. The Universal Military Training and Service Act Does Not, in Itself, Authorize a Civil Action for Damages Against a Federal Official.

On pages 6, 13, 14, 15-18 of appellant's Opening Brief appear the contention, and arguments pertaining thereto, that the Universal Military Training and Service Act, as such, provides a basis for federal question jurisdiction of a civil action for damages against a federal official such as the present action. The Act

as such was not invoked as a basis for federal question jurisdiction in paragraph I of appellant's Complaint, which paragraph appears to be the only one dealing specifically with the question of jurisdiction. [R. 2-3.] As a result, the District Court did not discuss the issue of federal question jurisdiction arising solely from the Act.

The reasoning on pages 13 and 14 of the Opening Brief appears to be that since Congress has declared in the Act and it is repeated in the Code of Regulations that service in the armed forces and in the reserve components thereof should be "in accordance with a system of selection which is fair and just", there is therefore a remedy in a suit for damages by any registrant who has been "harassed for years by conduct that can be shown to be malicious and beyond the jurisdiction of the board, or conduct that is a neglect of the duties of board members and of the clear and indisputable rights and privileges of the registrant, timely asserted by him, . . ." (B. 13-14.)

It is conceivable that a person might have an action in tort in state court against federal officials who have acted outside of the scope of their authority and who are not diverse in citizenship from the aggrieved person. In such a situation, the aggrieved party could use a federal forum where diversity of citizenship existed. Of course appellant in the present case is not relying on diversity of citizenship as the basis for the jurisdiction of the District Court, and the question of

the subject matter jurisdiction of the District Court must be considered entirely apart from the question of any possible immunity of the federal officials stemming from their having performed acts within the scope of their authority.

Since, if torts were committed by federal officers acting *outside* of the scope of their authority, there could be a suit for damages available to an aggrieved party either in state or federal court, depending on the existence of diversity of citizenship, in such case, the problem seen by appellant in providing a "remedy" would be non-existent. The law applicable where the officers were acting *within* the scope of their authority is set forth in Section II of this Argument.

Appellant does not, indeed cannot, point to any specific provision of the Universal Military Training and Service Act which authorizes a civil action for damages against a federal official. Federal question jurisdiction for appellant's suit cannot be derived from the Act.

There is nothing in *Townsend v. Zimmerman,* 237 F. 2d 376 (6th Cir. 1956), cited by appellant on page 15 of the Opening Brief which would provide a basis for a suit for damages against federal officers of the Selective Service System. The *Townsend* case was an action for an injunction and did not relate to any request for damages.

II.

Assuming Arguendo, the Existence of a Federal Question, Appellee Rudolph Zuieback and the Other Named Defendants Are Immune From a Suit for Damages Because the Acts Alleged to Have Been Performed by Them Were Within the Scope of Their Authority as Federal Officials.

As stated in the Opinion of the District Court, the non-existence of a basis for federal question jurisdiction obviates the necessity of deciding whether or not the appellee and the other named defendants are immune from a suit from damages on the ground that their acts were performed within the scope of their authority as federal officers. Without federal question jurisdiction and without diversity of citizenship jurisdiction the federal District Court is not available to appellant as a forum for his action. [R. 69; 194 F. Supp. at p. 659].

Appellant has devoted a major portion of his Opening Brief to the question of immunity. (B. 6-13, 16.) Assuming, for the purposes of discussion, that a basis for subject matter jurisdiction exists, an examination of appellant's Complaint and of the law applicable thereto leads to the conclusion that the appellee and the other named defendants "acted well within the scope of their authority as outlined in the Selective Service statutes and the Regulations promulgated thereunder" and are therefore immune from a suit for damages. The cases cited by the District Court in support of its conclusion represent what is clearly the law throughout the United States. [R. 69-70; 194 F. Supp. at p. 659.]

It cannot be contested that federal officers are immune from liability for acts performed within the scope of their authority and under color of office.

Barr v. Matteo, 360 U. S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959);

Spalding v. Vilas, 161 U. S. 483, 40 L. Ed. 780, 16 S. Ct. 631 (1896);

Bershad v. Wood, 290 F. 2d 714 (9th Cir. 1961);

Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959);

Ocampo v. Hardisty, 262 F. 2d 621 (9th Cir. 1958);

Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949).

Assuming, solely for the purposes of this discussion, that the allegation in appellant's Complaint that the motives of appellee and the other named defendants in performing the acts alleged by appellant were malicious, such malice would not strip appellee of the immunity granted him by law.

Barr v. Matteo, supra;

Gregoire v. Biddle, supra.

The test of whether the acts of any particular officer were done with the scope of his official authority and under color of his office was very clearly set forth in the decision of the Court of Appeals for the District of Columbia in *Cooper v. O'Connor,* 99 F. 2d 135, 139 (D. C. Cir. 1938), cert. den. 305 U. S. 642, 59 S. Ct. 146 (1938), as follows:

"* * *

It is not necessary—in order that acts may be done within the scope of official authority—that

> they should be prescribed by statute (United States v. Birdsall, 233 U. S. 223, 230-231, 34 S. Ct. 512, 58 L. Ed. 930); or even that they should be specifically directed or requested by a superior officer. Mellon v. Brewer, 57 App. D. C. 126, 129, 18 F. 2d 168, 171, 153 A. L. R. 1519, certiorari denied, 275 U. S. 530, 48 S. Ct. 28, 72 L. Ed. 409. It is sufficient if they are done by an officer '*in relation* to matters committed by law to his control or supervision.' [Italics supplied.] (Standard Nut Margerine Co. v. Mellon, 63 App. D. C. 339, 341, 72 F. 2d 557, 559, certiorari denied, 293 U. S. 605, 55 S. Ct. 124, 79 L. Ed. 696; or that they have '*more or less connection with* the general matters committed by law to his control or supervision.' [Italics supplied] (Spalding v. Vilas, 161 U. S. 483, 498, 16 S. Ct. 631, 637, 40 L. Ed 780; and see Lang v. Wood, 67 App. D. C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.
>
> * * *"

The test on scope of authority and color of office in *Cooper v. O'Connor* was cited with approval and applied in *Bershad v. Wood,* 290 F. 2d 714, 717, and in *Ocampo v. Hardisty,* 262 F. 2d 621, 624-625 (9th Cir. 1958).

Contrary to the contentions on page 7 of the Opening Brief, it is presently the law that the immunity granted to officers performing acts within the scope of their authority and under color of office extends to officers well below the high policy making levels, *e.g.,* a collection officer of the Internal Revenue Service

in *Bershad v. Wood, supra;* local employees of the Internal Revenue Service in *Ocampo v. Hardisty, supra,* and an Assistant United States Attorney and a Federal Bureau of Investigation Agent, in *Cooper v. O'Connor, supra.*

The rule of immunity of federal officers to suits for damages for acts performed within the scope of their official authority and under color of their office has been extended to the officers of a Draft Board in *Gibson v. Reynolds,* 172 F. 2d 95 (8th Cir. 1949), cert. den. 337 U. S. 925, 69 S. Ct. 1170, 93 L. Ed. 1733 (1949). The suit in the *Gibson* case was an action against the members of a local draft board, the Selective Service Appeal Board, the State Director of Selective Service and his assistant, the Chief of the Legal Division, seeking damages for alleged improper classification of plaintiff.

The allegations of the Complaint in the *Gibson* case are quite similar to those in the present case. Those allegations were as follows:

1. That the defendants acted contrary to and in violation of the regulations concerning the classification of ministers;

2. That the defendants ignored and disregarded and failed to consider a directive from Selective Service National Headquarters concerning Jehovah's Witnesses;

3. That the defendants discriminated against plaintiff contrary to the due process clause of the Fifth Amendment to the United States Constitution, and

4. That the defendants deprived plaintiff of his procedural rights of due process to a full and fair hearing by a fair and unprejudiced Board contrary to the

due process clause of the Fifth Amendment to the United States Constitution.

The Court of Appeals for the Eighth Circuit applied the doctrine hereinabove described concerning the immunity of federal officers in affirming the order and judgment of the District Court dismissing appellant's complaint for damages against the Selective Service officials. After enumerating the many categories of officials to which immunity had already been extended, the Court discussed the absolute necessity that Selective Service officials maintain an independence of action and a "freedom from threats, duress or compulsion of any kind . . ." (172 F. 2d at p. 98). The *Gibson* case was specifically cited and followed in a case involving similar facts in *Dodez v. Weygandt,* 173 F. 2d 965 (6th Cir. 1949).

The *Gibson* case was decided contemporarily with *Gregoire v. Biddle, supra,* and long before *Barr v. Matteo, supra.* At the time of the *Gibson* decision it was, therefore, not altogether clear what effect any malice on the part of the federal officers involved would have on the immunity granted. The *Barr* and *Gregoire* cases now leave no further ground for dispute on the point. The language in the *Gibson* case which could possibly be deemed to intimate that some limitation of immunity would result under certain conditions involving malice, which language is relied on by appellant on pages 9 and 10 of the Opening Brief, was criticized at an early time and labeled an obsolete and repudiated doctrine in *Papagianakis v. The Samos,* 186 F. 2d 257, 260 (4th Cir. 1950). In following the view of the Second Circuit in the *Gregoire* case in their decision in *Barr v. Matteo, supra,* the Supreme Court has forever laid the question to rest.

An application of the test of scope of authority set forth in *Cooper v. O'Connor, supra,* to the facts of the present case shows that the acts alleged to have been done by the appellee Rudolph Zuieback and those other individual Selective Service officers named in the Complaint were clearly performed with the scope of their authority and under the color of their office. The acts alleged in the Complaint were clearly done "in relation to matters committed by law" to the control or supervision of the defendants and certainly had "more or less connection with the general matters" committed by law to their control or supervision. (32 C. F. R. §1600 *et seq.*) In order to qualify under the test set forth in *Cooper v. O'Connor,* it is not necessary that every act alleged in the Complaint be supported by a specific statute or regulation. Even so, in his Memorandum of Points and Authorities in Support of his Motion to Dismiss appellant's Complaint, appellee was able to so support the acts alleged by appellant. [R. 25-33.]

Conclusion.

It is respectfully submitted that the Judgment of the District Court, ordering the dismissal of appellant's Complaint for Damages against the appellee and the other defendants named in appellant's Complaint, should be affirmed.

Respectfully submitted,

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